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IN THE
COURT OF APPEALS OF INDIANA

DARRYL SAMUEL HOWARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0703-CR-162
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0508-FA-26

July 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Darryl Samuel Howard appeals his sentence for Dealing in Cocaine,[1] a class B felony. Specifically, Howard argues that the trial court erred by failing to recognize several proffered mitigators and that his sentence is inappropriate in light of the nature of his offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

On August 8, 2005, Howard possessed cocaine in a house in Lafayette that was located within 1,000 feet of Right Start Daycare. Howard, Charmaine Wilson, Jason Brewer, and Brenda Elmore intended to deliver the cocaine, which was packaged in eight plastic bags.

On August 10, 2005, the State charged Howard with class A felony dealing in cocaine, class A felony possession of cocaine, class A felony conspiracy to commit dealing in cocaine, and class A misdemeanor possession of paraphernalia. On May 10, 2006, Howard pleaded guilty to class B felony dealing in cocaine and class B felony possession of cocaine and the State dismissed the remaining charges. The parties' plea agreement provided that the sentences for the two counts would run concurrently and capped the maximum executed sentence Howard could receive at fifteen years imprisonment.

At the sentencing hearing on June 9, 2006, the trial court expressed concern that the class B felony dealing in cocaine charge and the class B felony possession of cocaine charge involved the "same cocaine" and the State stated that it "[would not] object" if the trial court

[1] Ind. Code § 35-48-4-1.

only entered judgment on the class B felony dealing in cocaine charge. Tr. p. 17. Consequently, the trial court only entered judgment on that charge and sentenced Howard to seventeen years with four years suspended to probation, for an executed term of thirteen years imprisonment. Specifically, the trial court ordered that Howard serve ten years at the Indiana Department of Correction and three years at the Tippecanoe County Community Corrections. Howard now appeals.

DISCUSSION AND DECISION

Howard argues that the trial court erred by failing to find proffered mitigating circumstances supported by the record and that his thirteen-year executed sentence is inappropriate in light of the nature of the offense and his character. Howard requests that we modify his sentence to a term of ten years with two years suspended to probation, for an executed term of eight years imprisonment.

I. Anglemyer and the Amended Sentencing Scheme

Before addressing the merits of Howard's arguments, we observe that on April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes,[2] which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. When determining the sentence to impose on a defendant, the trial court "may consider" certain enumerated aggravating and mitigating circumstances in addition to

[2] Howard committed the crimes after the April 2005 amendment of the sentencing statutes; thus, we will apply the amended versions thereof.

other matters not listed in the statute. I.C. §§ 35-38-1-7.1(a) to -7.1(c). Furthermore, the legislature provided that a trial court "may impose any sentence that is . . . authorized by statute . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances." I.C. § 35-38-1-7.1(d).

Notwithstanding this provision, the legislature kept in place a requirement that, when sentencing a defendant for a felony conviction, if the trial court finds aggravating or mitigating circumstances, it must create "a statement of the court's reasons for selecting the sentence it imposes." I.C. § 35-38-1-3(3). Our Supreme Court recently concluded, therefore, that the "new statutory regime" mandates that trial courts must enter sentencing statements whenever imposing sentences for felony convictions. Anglemyer v. State, --- N.E.2d ---, No. 43S05-0606-CR-230, slip op. p. 9 (Ind. June 26, 2007).

Sentencing statements are not required to contain a finding of aggravators or mitigators; rather, they need include only a "reasonably detailed recitation of the trial court's reasons for imposing a particular sentence." Id. If the statement does, however, include a finding of aggravators or mitigators, then it must "identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Id.

Essentially, a defendant may now make two types of challenges to the trial court's imposition of a felony sentence—process-based and result-based. We review challenges to the trial court's sentencing process for an abuse of discretion. Id. at 10 (concluding that "[s]o long as the sentence is within the statutory range, it is subject to review only for abuse of

discretion"). The trial court may abuse its discretion in the following ways during the sentencing process: (1) by failing to enter a sentencing statement; (2) by entering a sentencing statement that includes reasons not supported by the record; (3) by entering a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or (4) by entering a sentencing statement that includes reasons that are improper as a matter of law. Id. We hasten to note that even if we conclude that the trial court erred during the sentencing process, we have "the option to remand to the trial court for a clarification or new sentencing determination [or] we may exercise our authority to review and revise the sentence." Windhorst v. State, -- N.E.2d --, No. 49S04-0701-CR-32, slip op. p. 4-5 (Ind. June 26, 2007) (internal citations omitted).

If a defendant chooses to challenge the result of the sentencing process—i.e., the sentence itself—then he or she must do so via Appellate Rule 7(B), which provides that the "[c]ourt may review a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." See Anglemyer, slip op. at 10-11 (holding that because "a trial court [cannot] now be said to have abused its discretion in failing to 'properly weigh'" aggravators and mitigators, if the trial court enters a proper sentencing statement then the only way a defendant can challenge the sentence is via Rule 7(B)). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

II. Sentencing Process

Here, the trial court entered an oral sentencing statement at the conclusion of the sentencing hearing and filed a written sentencing order on June 13, 2006. The trial court found Howard's prior criminal history[3] to be an aggravating factor and found no mitigating factors. Howard now argues that the trial court should have found the hardship his incarceration would cause for his children, his guilty plea, and his serious drug addiction to be significant mitigating factors.

An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Anglemyer, slip op. at 13 (citing Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999)). However, if the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist. Anglemyer, slip op. at 13.

Howard presented little evidence at the sentencing hearing that his incarceration would cause undue hardship on his two children. While Jennifer Duncan wrote a letter to the court stating that she is the mother of Howard's children and that he has always been a "good father," appellant's app. p. 81, the majority of Duncan's letter is devoted to her claim that Howard is not actually a drug dealer. The record shows that Howard "has never been ordered to pay child support," id. at 89, and Howard did not present evidence that he provides support for his children anyway. Therefore, it is apparent to us that rather than

[3] Howard acknowledges that his criminal history is a "legitimate aggravator." Appellant's Br. p. 6.

overlooking any hardship that Howard's incarceration would impose on his children, the trial court determined, instead, that the minimal evidence presented at the hearing did not support this proposed mitigator. The trial court's conclusion was not an abuse of discretion.

Turning to Howard's argument that the trial court erred by not finding his guilty plea to be a mitigating factor, we note that Howard received a substantial benefit for pleading guilty—he was initially charged with three class A felonies but pleaded guilty to two class B felonies, one of which was dismissed after the trial court expressed double jeopardy concerns. Although our Supreme Court has previously held that a defendant who pleads guilty deserves to have some mitigating weight extended to his guilty plea in return, Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005), it is well settled that the significance of a guilty plea varies from case to case, Francis v. State, 817 N.E.2d 235, 238 n.3 (Ind. 2004). And under the new sentencing scheme, "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse," Anglemyer, slip op. at 11 (emphasis added). Therefore, even if we assume that the trial court abused its discretion by not finding Howard's guilty plea to be a mitigating factor, such error was harmless in light of the substantial benefit that Howard received pursuant to the plea agreement and our ultimate conclusion that his sentence is not inappropriate in light of the nature of the offense and his character.

Howard also argues that the trial court failed to find his serious drug problem to be a mitigating factor. However, Howard's argument that the trial court completely overlooked his history of substance abuse fails because, during its oral sentencing statement, the trial

court acknowledged that Howard "has a serious substance abuse problem." Tr. p. 25. While the trial court did not find Howard's drug problem to be a mitigator, we note that trial courts have previously found a defendant's drug addiction to be an aggravator, which the trial court here did not do. See Burgess v. State, 854 N.E.2d 35, 40 n.5 (Ind. Ct. App. 2006) (upholding trial court's determination that defendant's risk of reoffending was a valid aggravator because of his methamphetamine addiction). And although Howard completed a court-ordered drug treatment program after a previous conviction in Illinois, he soon began using and dealing drugs in Indiana, which does little to convince us that he truly desires rehabilitation. Therefore, we cannot conclude that the trial court abused its discretion by not finding Howard's drug problem to be a mitigating factor.

III. Appropriateness

Howard argues that his thirteen-year executed sentence is inappropriate in light of the nature of the offense and his character. Specifically, Howard argues that his "aggravated sentence is inappropriate to the run-of-the-mill nature of his offense and his overall good (but drug-addicted) character." Appellant's Br. p. 6.

Regarding the nature of the offense, Howard was arrested within 1,000 feet of a daycare center in Lafayette while he had at least three grams of cocaine in his possession. The cocaine was packaged in eight plastic bags for distribution, and Howard admitted that he intended to deal the cocaine. Tr. p. 10, 24. In light of Howard's illegal actions in such close proximity to a center that provides care to children, we conclude that the nature of his offense does not aid his inappropriateness argument.

Turning to Howard's character, we have already briefly discussed his drug problem. Howard first used drugs at the age of sixteen and last used drugs on the day he was arrested. Howard's previous criminal history consists of two previous convictions in Illinois, one for felony manufacturing/delivering a controlled substance and one for misdemeanor possession of cannabis. Although Howard was sentenced to three years imprisonment at the Illinois Department of Corrections and completed a court-ordered drug treatment program, he began using and dealing cocaine in Indiana instead of choosing to lead a law-abiding life. And, as previously noted, there is little evidence that Howard's incarceration will negatively impact his two children, and his decision to plead guilty may have been largely pragmatic.

Furthermore, Howard's plea agreement allowed the trial court to sentence him to an executed term of up to fifteen years imprisonment. However, the trial court sentenced him to an executed term of thirteen years imprisonment and was careful to fashion a sentence that would provide Howard with "more than one opportunity to help him address his needs." Id. at 26. Therefore, in light of the nature of the offense and Howard's character, we cannot conclude that his sentence was inappropriate.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., concurs.

CRONE, J., concurs in result.